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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

FLOYD WALLACE,

Plaintiff,

vs.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT; STATE OF NEVADA;  
CHRISTIAN TORRES; JASON SHOEMAKER;  
CORY MCCORMICK and DOES 1 to 50,  
inclusive,

Defendants.

Case Number:  
2:23-cv-00809-APG-NJK

**DEFENDANT LVMPD'S REPLY IN**  
**SUPPORT OF MOTION TO DISMISS**  
**ECF NO. 8**

Defendant Las Vegas Metropolitan Police Department ("LVMPD"), by and through its attorney of record, Craig R. Anderson, Esq., of Marquis Aurbach, hereby files its Reply in Support of Defendant LVMPD's Motion to Dismiss (ECF No. 8). This Reply is made and based upon the Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument allowed by counsel at the time of hearing.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

On July 17, 2023, LVMPD filed its motion to dismiss all claims against it pursuant to FRCP 12(b)(6) ("LVMPD's Motion"). (ECF No. 8) Wallace opposed LVMPD's Motion on July 26, 2023 ("Opposition"). (ECF No. 15) LVMPD now replies.

Wallace's Opposition does not seriously challenge LVMPD's Motion. Rather than supply this Court with facts and law countering LVMPD's arguments, the Opposition just complains LVMPD (1) ascribed a color to the mask he was wearing on the day of his arrest, (2) referred to

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him as a “First Amendment auditor,” and (3) ignored the unpled fact an officer pointed a gun at him. Wallace, via silence, abandons most of his claims. His Opposition never addresses LVMPD’s request to dismiss his equal protection-based claims, First Amendment-based claims, § 1981 discrimination claim, state law invasion of privacy claim, and state law negligence claim. The Opposition only contests dismissal of Wallace’s false arrest-based claims and his excessive force-based claims. As set forth below, the false arrest and excessive force claims fail as a matter of law and Wallace has failed to identify any new facts that could save the claims from dismissal.

## II. STATEMENT OF FACTS

The following facts are undisputed:

- On May 10, 2023, Wallace was in the parking lot of the LVMPD’s Spring Valley Command Substation, where he was filming vehicles enter an area marked “Police personnel only.” (ECF No. 1 at ¶ 17)
- Wallace was dressed suspiciously and wearing a mask. (*Id.* at ¶ 33)
- While Wallace was filming, a man in street clothes asked what he was doing, and he refused to answer. (*Id.* at ¶ 17)
- Wallace returned to the public sidewalk when he was approached by officers with guns drawn. (*Id.* at ¶¶ 22 and 24)
- The officers believed Wallace was engaging in suspicious behavior because he was wearing a mask while filming vehicles entering into a restricted area of the substation. (*Id.* at ¶¶ 17, 33, and 38)
- Once detained, Wallace refused to identify himself. (*Id.* at ¶¶ 32)
- Wallace was eventually arrested for attempted trespass and transported to jail, where he was released with a citation. (*Id.* at ¶¶ 46 and 48)

## III. FACTUAL/PROCEDURAL ISSUES.

Wallace’s Opposition complains LVMPD’s Motion misrepresents facts by stating his mask was black, he is a First Amendment auditor, and omitting an officer pointed a firearm at him. The Opposition also asks this Court to view Wallace’s pleadings liberally because he is representing himself.

1           **A.       FACTUAL ISSUES.**

2                   **1.       The mask issue.**

3           Wallace's Complaint admits he was wearing a mask at the time of his detention. (ECF  
4   No. 1 ¶¶33, 38) LVMPD's Motion states Wallace was wearing a "black mask." (ECF No. 8 at  
5   2:5, 3:5, and 10:16) In opposition, Wallace complains LVMPD's Motion "begins trying to spin  
6   its own narrative" by identifying the mask as "black" in color. (ECF No. 15 at 1:19-22) Wallace  
7   never claims his mask was not black in color. Regardless, the color of Wallace's mask is  
8   immaterial to resolving LVMPD's Motion as the only material fact is that Wallace was wearing  
9   a mask while attempting to film an area off limits to the public.

10                   **2.       The "First Amendment auditor" issue.**

11           Wallace's Complaint states "one of the officers *did understand* that Plaintiff *was a first*  
12   *amendment auditor . . .*" (ECF No. 1 at ¶43 (emphasis added)) As a result of this admission,  
13   LVMPD's Motion refers to Wallace as a "First Amendment auditor." (ECF No. 8 at 3:23) In his  
14   Opposition, Wallace now "denies being a First Amendment auditor" and nonsensically supports  
15   this denial with the statement "LVMPD is full of crooked cops . . ." (ECF No. 15 at 4:9)  
16   Opposite of the factual issue involving the color of his mask, Wallace is now upset LVMPD  
17   quoted his Complaint verbatim. Whether or not Wallace is a First Amendment auditor is not  
18   material to resolving LVMPD's Motion.

19                   **3.       The firearm issue.**

20           Wallace's Complaint alleges after he returned to the public sidewalk, he heard someone  
21   yell "Police, stop!" When he turned around, he "witnessed a police officer walking toward [him]  
22   with a gun drawn." (ECF No. 1 at ¶24) LVMPD's Motion quotes Wallace's Complaint and  
23   admits an officer "approached [Wallace] 'with a gun drawn.'" (ECF No. 8 at 12:23) In his  
24   Opposition, Wallace asserts LVMPD should have known "I meant . . . [t]he weapon was pointed  
25   at me including my head." (ECF No. 15 at 3:21-22) In short, Wallace, contrary to his "black"  
26   mask issue, is upset LVMPD did not include unples facts in their Motion. Regardless, the only  
27   material fact is an officer approached Wallace "with a gun drawn."  
28

**B. THE PROCEDURAL IMPACT OF WALLACE’S PRO PER STATUS.**

Wallace asserts because he is a pro se party, the Court should provide a “liberal interpretation” of his Complaint. (ECF No. 15 at 2:10-11) LVMPD agrees the law requires courts to provide some latitude to parties representing themselves. However, “the liberal treatment afforded to pro se litigants does not exempt a pro se party from compliance with relevant rules of procedural and substantive law.” *Soto v. Sweetman*, 882 F.3d 865, 872 (9th Cir. 2018) (“This rule [requiring that courts liberally construe pro se filings] does not exempt [pro se litigants] from all compliance”); *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) (“Although we construe pleadings liberally in their favor, pro se litigants are bound by the rules of procedure.”); *Leon v. Rockland Psychiatric Ctr.*, 232 F. Supp. 3d 420, 428 (S.D.N.Y. 2017) (quoting *Bell v. Jendell*, 980 F. Supp. 2d 555, 559 (S.D.N.Y. 2013)); *see also Ruggiero v. City of Cortland*, 2019 WL 1978623, at \*3 (N.D.N.Y. May 3, 2019) (“Although pro se plaintiffs are entitled to a significant measure of latitude when it comes to pleading and in matters of procedure, the solicitude afforded to a party who chooses to proceed without the benefit of a lawyer is not boundless.”).

Here, Wallace has chosen not to oppose LVMPD’s arguments regarding his equal protection-based claims, First Amendment-based claims, § 1981 discrimination claim, state law invasion of privacy claim, and state law negligence claim. In doing so, Wallace has failed to provide this Court with any additional facts or law to “liberally construe.” In essence, Wallace is improperly asking this Court to scour his Complaint and help him come up with arguments or facts to defeat LVMPD’s Motion. *See Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (noting that “[i]t is not [an appellate court’s] task, or that of the district court to scour the record in search of a genuine issue of triable fact.”); *see also Arisman v. Woodford*, 2009 WL 814245, \*2 (N.D. Cal. Mar. 25, 2009) (applying *Keenan* in ruling on a motion to dismiss). Thus, although this Court should liberally construe Wallace’s facts, it is not this Court’s job to do Wallace’s job for him.

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1 **IV. LEGAL ARGUMENT**

2 **A. WALLACE'S *MONELL* CLAIM AGAINST LVMPD MUST BE**  
 3 **DISMISSED.**

4 As set forth in LVMPD's Motion to Dismiss, Wallace's claims against LVMPD fail for  
 5 two reasons: (1) he has failed to plead facts supporting a constitutional violation and (2) even if  
 6 he has pled sufficient facts, he has not pled facts supporting a *Monell* claim against LVMPD.  
 7 Wallace's Opposition does little to counter LVMPD's arguments.

8 **1. Wallace has not pled facts supporting a constitutional violation**  
 9 **against the individual officers.**

10 **a. The unlawful detention/false arrest claim (First COA).**

11 Wallace argues the officers lacked reasonable suspicion to detain him and lacked  
 12 probable cause to arrest him. (ECF No. 1, First COA) LVMPD's Motion establishes Wallace's  
 13 pled facts confirm the officers had both reasonable suspicion to detain him and probable cause to  
 14 arrest him. In Opposition, Wallace counters the officers lacked probable cause because the  
 15 District Attorney dropped all charges against him. (ECF No. 15 at 2:17-18) (It appears Wallace  
 16 is abandoning his lack of reasonable suspicion claim as he offers no argument on this issue.)

17 As set forth in LVMPD's Motion, "[t]he Constitution does not guarantee that only the  
 18 guilty will be arrested." *Olsen v. Henderson*, 2:12-CV-543-JCM (PAL), 2014 WL 806315, at \*5  
 19 (Feb. 27, 2014) (citing *Baker v. McCollan*, 443 U.S. 137, 144 (1979)). The eventual disposition  
 20 of the charges is immaterial to a court's probable cause determination as a conviction requires a  
 21 higher burden of proof than is required to show probable cause. *See, e.g., Peschel v. City of*  
 22 *Missoula*, 686 F.Supp.2d 1107, 1121 (D. Mont. 2009) (citing *Illinois v. Gates*, 462 U.S. 213, 235  
 23 (1983)).

24 Here, based on the undisputed facts, the officers had probable cause to cite Wallace for  
 25 attempted trespass under NRS 207.200(1) because he admitted to filming a restricted area of the  
 26 LVMPD substation. The officers reasonably concluded Wallace intended to "vex or annoy the  
 27 owner or occupant" or "commit a[n] unlawful act." *See* NRS § 207.200(1).

28 Further, the Supreme Court has explained when there is probable cause to arrest for any  
 crime, the arrest does not violate the Fourth Amendment, even if that crime was not actually

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1 charged. *See Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004); *Ewing v. City of Stockton*, 588  
 2 F.3d 1218, 1230 n.19 (9th Cir. 2009). Here, the LVMPD officers could have also arrested  
 3 Wallace for obstructing a public officer. NRS § 197.190 states an individual obstructs a public  
 4 officer when, “after due notice, shall refuse or neglect to make or furnish any statement, report or  
 5 information lawfully required of him by any public officer . . . or who shall willfully hinder,  
 6 delay or obstruct any public officer . . . [is] guilty of a misdemeanor.” *Id.* NRS § 171.123(3)  
 7 states an “officer may detain the person pursuant [to reasonable suspicion] to ascertain the  
 8 person’s identity and the suspicious circumstances surround[ing] the person’s presence abroad.  
 9 Any person so detained shall identify himself or herself . . .” *Id.*

10 The issue on obstruction is straight-forward. Wallace’s Complaint admits he obstructed  
 11 the LVMPD officers’ investigation by initially failing to identify himself. (ECF No. 1 at ¶32  
 12 (“Plaintiff refused to answer questions about his identity . . .”)); *see Tsao v. Desert Palace, Inc.*,  
 13 698 F.3d 1128, 1146-47 (9th Cir. 2012) (Under Nevada law, it is obstruction to “impede” and  
 14 prolong an investigation.) By initially refusing to identify himself, Wallace admits he neglected  
 15 to furnish a statement required by NRS § 171.123(3) and willfully hindered the officers’  
 16 investigation.

17 Thus, based upon the above, Wallace’s pled facts establish the LVMPD officers had  
 18 probable cause to arrest him.

19 **b. The unreasonable search and seizure of property claim (First**  
 20 **COA).**

21 Wallace alleges the LVMPD officers unreasonably searched and seized his property.  
 22 (ECF No. 1 at ¶48) This claim is dependent on Wallace first establishing his arrest lacked  
 23 probable cause. Because reasonable suspicion/probable cause existed, this claim fails as a matter  
 24 of law.

25 **c. Wallace’s excessive force claim (First COA).**

26 Wallace argues in his Opposition “LVMPD alleges that I don’t allege that a gun was  
 27 pointed at me in the Complaint, but I did allege that.” (ECF No. 15 at 3:18-19) This is inaccurate.  
 28 LVMPD admits the officers approached Wallace with their guns drawn. (ECF No. 8 at 12:23)

1 LVMPD's Motion argues the mere fact the LVMPD officers drew their guns is not sufficient to  
2 state an excessive force claim. (*Id.* at 12:25-13:3) Wallace's Opposition does not challenge this  
3 argument.

4 **d. The Fourteenth Amendment equal protection claim (Second**  
5 **COA).**

6 Wallace alleges the LVMPD officers discriminated against him based upon his race, his  
7 position as a member of the press, and his (undefined) political affiliation. LVMPD's Motion  
8 argues Wallace's Complaint fails to plead any facts supporting this claim, and, therefore,  
9 dismissal is appropriate.

10 Under the Nevada local rule, "[t]he failure of the opposing party to file a memorandum of  
11 points and authorities in opposition to any motion shall constitute a consent to the granting of the  
12 motion." *See* LR 7-2(d). Wallace's Opposition makes no effort to refute LVMPD's argument and  
13 offers no new facts he could plead supporting this claim. As such, he is consenting to dismissal  
14 of this claim. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (affirming grant of an unopposed  
15 motion to dismiss under Nevada local rule by deeming a pro se litigant's failure to oppose as  
16 consent to granting the motion).

17 **e. The First Amendment claim (Third COA).**

18 Wallace alleges the LVMPD officers arrested him in retaliation for him exercising his  
19 First Amendment rights. (ECF No. 1 at ¶61) As set forth above, the LVMPD officers had  
20 probable cause to arrest Wallace for both attempted trespass and obstruction (when he admittedly  
21 refused to identify himself). Further, Wallace admits he was attempting to film an area clearly  
22 marked off-limits to the public. Thus, there are no pled facts suggesting he was arrested for  
23 filming a public police encounter with law enforcement as he was admittedly filming a non-  
24 public area. Wallace's Opposition makes no attempt to argue against the dismissal of this claim,  
25 and he sets forth no additional facts he could plead. Thus, dismissal is appropriate. *See* LR 7-  
26 2(d); *Ghazali*, 46 F.3d at 53.

27 **f. 42 U.S.C. § 1981 claim (Fifth COA).**

28 Wallace pled a § 1981 claim alleging the LVMPD officers discriminated against him.



After LVMPD filed its Motion to Dismiss, the Ninth Circuit issued an opinion indicating while § 1981 claims establish substantive rights that a state actor may violate, it does not contain a remedy against that state actor for such violations. *Yoshikawa v. Seguirant*, ---4th ---, 2023 WL 4722982 \*2 (9th Cir. 2023) (en banc). Thus, the *Yoshikawa* Court held a plaintiff seeking to enforce rights secured by § 1981 action against a state actor must instead plead their cause of action as a 42 U.S.C. § 1983 claim. *Id.* Therefore, this claim must be dismissed.

**2. Even if Wallace has pled a viable 42 U.S.C. § 1983 claim against the individual offices, he has not pled sufficient facts to support a *Monell* claim.**

LVMPD's second argument is that, even if Wallace's Complaint states a constitutional violation (which it does not), the Court must still dismiss LVMPD because Wallace has pled no facts suggesting an unconstitutional policy, practice or custom. *See Monell v. Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978). The standard for pleading a *Monell* claim has been described as "not a low bar", "demanding", and "rigorous." *See Sabra v. Maricopa Cnty. Community College District*, 44 F.4th 867, 884 n.9 (9th Cir. 2022) (collecting cases).

Wallace's Opposition makes no attempt to counter LVMPD's argument on this issue and offers no new facts he could plead to support this claim. As such, dismissal on this ground is appropriate as well. *See* LR 7-2(d); *Ghazali*, 46 F.3d at 53.

**B. DISMISSAL OF WALLACE'S STATE LAW CLAIMS IS ALSO APPROPRIATE.**

In addition to his federal law claims, Wallace also alleges Nevada state law claims including assault and battery, false arrest and false imprisonment, invasion of privacy, and negligence.

**1. Assault and battery.**

Wallace's state law assault and battery claims are premised on the same facts as his § 1983 excessive force claim. As such, these claims require dismissal for the same reasons. *See Ramirez v. City of Reno*, 925 F.Supp. 681, 691 (D. Nev. 1996) (the standard for common-law assault and battery by a police officer is same as a § 1983 excessive force claim).



1                                   **2.       False arrest and false imprisonment.**

2               These state law claims mirror Wallace’ s§ 1983 false arrest and illegal search and seizure  
3 claims. *Marschall v. City of Carson*, 464 P.2d 494 (Nev. 1970). Thus, these claims fail for the  
4 same reason as Wallace’s § 1983 false arrest claim. In addition, the officers would be protected  
5 under Nevada’s discretionary immunity statute, NRS § 41.032. *See Ortega v. Reyna*, 953 P.2d  
6 18, 23 (Nev. 1998) (decision to arrest or not arrest is discretionary). Wallace’s Opposition does  
7 not contest either basis for dismissal.

8                                   **3.       Invasion of privacy.**

9               Wallace alleges the LVMPD officers violated his privacy rights by searching him. As set  
10 forth above, the searching of Wallace was a lawful search incident to an arrest. Wallace’s  
11 Opposition makes no opposing argument.

12                                  **4.       Negligence.**

13               Wallace alleges the officers conducted a negligent investigation prior to his arrest.  
14 LVMPD and its officers are immune from any negligent investigation claims. *Pittman v. Lower*  
15 *Court Counseling*, 871 P.2d 953, 956 (Nev. 1994); *Foster v. Washoe Cnty.*, 964 P.2d 788, 792  
16 (Nev. 1998). The Opposition makes no effort to establish this fact.

17                                  **C.       WALLACE SHOULD NOT BE GRANTED LEAVE TO AMEND.**

18               Wallace asks “[if] the Court grants the Motion to Dismiss,” he be granted “leave to  
19 amend, as it would not be futile, undue delay, or dilatory.” (ECF No. 15 at 19-20) LVMPD does  
20 not dispute that leave should be freely given. *See Fed.R.Civ.P. 15(a)*. Nevada’s local rules,  
21 before allowing leave to amend, requires “the moving party *must* attach the proposed amended  
22 pleading to a motion seeking leave of the court to file an amended pleading.” *See* LR 15-1; *see*  
23 *also Echeverria v. Nevada*, 2022 WL 3648382, \*1-2 (D. Nev. 2022) (leave to amend denied  
24 where movant failed to comply with LR 15-1.)

25               Wallace’s request for leave to amend fails to comply with LR 15-1. Further, his  
26 Opposition does not even hint at what additional facts Wallace could plead to avoid dismissal.  
27 Thus, if the Court is inclined to grant Wallace leave to amend, it should require him to follow the  
28 requirements of LR 15-1.

1     **V. CONCLUSION**

2             Based upon the above, LVMPD requests that its Motion to Dismiss be granted in its  
3     entirety.

4             Dated this 1<sup>st</sup> day of August, 2023.

5                             MARQUIS AURBACH

6  
7                             By s/Craig R. Anderson  
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12                            Attorneys for Defendant LVMPD

13                             **CERTIFICATE OF SERVICE**

14             I hereby certify that the foregoing **DEFENDANT LVMPD'S REPLY IN SUPPORT**  
15     **OF MOTION TO DISMISS** was submitted electronically for filing and/or service with the  
16     United States District Court on the 1<sup>st</sup> day of August, 2023. Electronic service of the foregoing  
17     document shall be made in accordance with the CM/ECF-Service List as follows: N/A

18             I further certify that I served a copy of this document by mailing a true and correct copy  
19     thereof, postage prepaid, addressed to:

20                             Floyd Wallace  
21                             1613 Leopard Lane  
22                             College Station, TX 77840  
23                             Pro Per

24                             s/Sherri Mong  
25                             an employee of Marquis Aurbach

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